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No. _____

# In The
# Supreme Court of the United States

October Term, 1997

KENNETH HUTCHINSON,

*Petitioner,*

-vs-

FISERV C.I.R., INC.,
and
BRIAN MURPHY-MOLLOY,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

*AND APPENDICES*

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## QUESTION PRESENTED

DID THE SIXTH CIRCUIT'S FAILURE TO ANALYZE THIS AGE DISCRIMINATION CASE PURSUANT TO APPROPRIATE EVIDENTIARY STANDARDS AND APPROPRIATE STANDARDS OF REVIEW OF A DENIAL OF A MOTION FOR JUDGMENT AS A MATTER OF LAW CONSTITUTE A "DEPART[URE] FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS * * * [SO] AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER"?

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KENNETH HUTCHINSON respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case. Pursuant thereto, this Court should enter a summary disposition on the merits in which it VACATES the opinion of the Sixth Circuit in this case and REMANDS this case to the Sixth Circuit for consideration of Respondents' appeal of an Order of Judgment entered by the United States District Court, Eastern District of Michigan, confirming a jury verdict of $800,000 in favor of MR. HUTCHINSON on his age discrimination claim against Respondents, FISERV-C.I.R., INC. and BRIAN MURPHY-MOLLOY (and for plenary consideration of MR. HUTCHINSON's cross-appeal to that Court). (Appendix E).

## OPINIONS BELOW

The opinion of the Sixth Circuit (Appendix B) is unreported. The Eastern District of Michigan issued no opinions.

## JURISDICTION

The Sixth Circuit issued its opinion and entered its judgment on July 8, 1997. (Appendix B). The Sixth Circuit denied Petitioner's timely petition for rehearing on August 12, 1997. (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

Petitioner's age discrimination suit is based on Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101 *et seq.*; Mich. Stat. Ann. § 3.548(101) *et seq.* Section 202 of that act provides, in relevant part:

> "(1) An employer shall not do any of the following:

> "(a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status."

Mich. Comp. Laws § 37.2202(1)(a); Mich. Stat. Ann. § 3.548(202)(1)(a).

In diversity cases, federal courts apply state substantive law. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938). Michigan courts consider federal law when reviewing claims of age discrimination based on Michigan law. *Tinker* v. *Sears, Roebuck & Co.*, ___ F.3d ___, No. 96-1418, 1997 WL 628995 (6th Cir. October 14, 1997) at *2; *Pleith* v. *St. Raymond Church*, 210 Mich.App. 568, 573; 534 N.W.2d 164, 167 (1995).

## STATEMENT OF THE CASE

Petitioner initially filed this case in the Circuit Court for the County of Oakland, State of Michigan, on April 18, 1991. Petitioner alleged that Respondents had violated the age discrimination provisions of Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101 *et seq.*; Mich. Stat. Ann. § 3.548(101) *et seq.*, regarding Petitioner's employment and discharge. (See Appendix F).

This case was removed to the United States District Court, Eastern District of Michigan, Southern Division, pursuant to 28 U.S.C. §§ 1332 and 1441, based on diversity of citizenship and amount in controversy. Petitioner is a citizen of Michigan. Respondent, FISERV-C.I.R., INC., is a Delaware corporation, its principal place of business is in Connecticut, and it does business in Michigan. Respondent, BRIAN MURPHY-MOLLOY, is a citizen of Vir-

ginia. The amount in controversy exceeded the then-existing $50,000 jurisdictional limit.

On April 19, 1995, after a trial that began on April 11, 1995, a federal district court jury concluded that Respondents had discriminated against MR. HUTCHINSON on the basis of age. The next day, an Order of Judgment was entered confirming the award of $800,000 in damages to Petitioner. (Appendix E).

Respondents' motions for judgment as a matter of law, new trial, remittitur and/or to amend the judgment and to stay execution of judgment were denied in orders entered on June 26, 1995. (Appendices C and D). Respondents appealed to the United States Court of Appeals for the Sixth Circuit.

On July 8, 1997, the Sixth Circuit issued an opinion reversing the district court's denial of respondents' motion for judgment as a matter of law and remanding this case to the district court with instructions to enter judgment in favor of respondents. (Appendix B at 1-2). On July 21, 1997, MR. HUTCHINSON filed a Petition for Rehearing in the Sixth Circuit. He alleged that the Sixth Circuit misconstrued the applicable substantive evidentiary standards governing age discrimination complaints and violated procedural requisites in its review of the record in an appeal from a denial of a motion for judgment as a matter of law. Fed.Rules Civ.Proc.Rule 50. On August 12, 1997, the Sixth Circuit issued an order denying Petitioner's Motion for Rehearing. (Appendix A).

## REASONS FOR GRANTING THE PETITION

The denial of MR. HUTCHINSON's Petition for Rehearing in the Sixth Circuit predates the issuance by that same Court of its opinion in *Kline* v. *Tennessee Valley Authority*, ___ F.3d ___, No. 94-6355, 1997 WL 631184 (6th Cir. October 15, 1997). *Kline* establishes that the Sixth Circuit's opinion in this case ignores or misconstrues the applicable substantive evidentiary standards governing age discrimination complaints as enunciated by this Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), clarified by this Court in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), and again clarified by this Court in *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) and should be viewed as aberrational according to **Sixth Circuit case law** applying the *McDonnell Douglas-Burdine-St. Mary's Honor Center* standards. *Kline* also establishes that the Sixth Circuit failed to abide by critical procedural requisites in its review of the record in an appeal from a denial of a motion for judgment as a matter of law authorized not just by other Circuit Courts of Appeals but by the Sixth Circuit itself.

For these reasons, this Court should GRANT this Petition for Writ of Certiorari, pursuant to Sup. Ct. R. 10(a), because "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" **and** "has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's supervisory power". Pursuant thereto, this Court should enter a summary disposition on the merits in which it VACATES the opinion of the Sixth Circuit in this case and REMANDS this case to the Sixth Circuit for consideration of Respondents' appeal in light of *Kline* and for plenary consideration of MR. HUTCHINSON's cross-appeal to that Court. Sup. Ct. R. 16.1.

**THE SIXTH CIRCUIT'S FAILURE TO ANALYZE THIS AGE DISCRIMINATION CASE PURSUANT TO THE EVIDENTIARY STANDARDS ENUNCIATED BY THIS COURT IN *McDONNELL DOUGLAS CORP.* v. *GREEN* AND CLARIFIED BY THIS COURT IN *TEXAS DEPARTMENT OF COMMUNITY AFFAIRS* v. *BURDINE*, AND *ST MARY'S HONOR CENTER* v. *HICKS*, PARTICULARLY AS INTERPRETED BY THE SIXTH CIRCUIT ITSELF IN *KLINE* v. *T.V.A.*, CONSTITUTES A "DEPART[URE] FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS * * * [SO] AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER" AND RESULTS IN A DECISION AT ODDS WITH OTHER CIRCUIT COURTS OF APPEALS REGARDING THE QUESTION OF THE APPROPRIATE EVIDENTIARY STANDARDS TO BE EMPLOYED IN SUCH CASES.**

The familiar tripartite shifting-burdens framework for disposition of employment discrimination cases most recently has been addressed by this Court in *St. Mary's Honor Center* v. *Hicks*, *supra*.[1] As the Sixth Circuit observed in *Kline* v. *T.V.A.*, *supra*, this Court intended to address a conflict that had arisen among the circuits regarding whether a plaintiff's burden to prove that an employer's articulation of a nondiscriminatory reason for the adverse employment action at issue was actually

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1 **The Sixth Circuit summarized this approach in *Kline*, *supra*:**

> **"First, the plaintiff must prove a prima facie case of discrimination. *Burdine*, 450 U.S. at 252-53 (citing *McDonnell Douglas*, 411 U.S. at 802 (1973)). If the plaintiff establishes its prima facie case, the burden then shifts to the defendant to 'articulate some legitimate, nondiscriminatory reason for the employee's rejection.' *Id.* (quoting *McDonnell Douglas*, 411 U.S. at 804). If the defendant carries this burden, the plaintiff must prove that the proffered reasons were pretextual. *Id.* (citing *McDonnell Douglas*, 411 U.S. at 804). Pretext is established by a direct showing that a discriminatory reason more likely motivated the employer or by an indirect showing that the employer's explanation is not credible. *Id.* at 256."**

***Id.* at *5.**

pretextual included both evidence of pretext and **additional** evidence of discrimination ("pretext plus") or whether evidence of pretext alone was sufficient to **require** judgment to be entered in favor of the plaintiff ("pretext only"). 1997 WL 631184 at *6.

This Court rejected both approaches. Rejecting the "pretext only" approach, this Court held that evidence from which a jury could disbelieve the employer's allegedly non-discriminatory reasons did not **compel** that judgment be entered in favor of the plaintiff. 509 U.S. at 511. This Court also rejected the "pretext plus" approach in the following oft-cited passage:

> "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is *required*,' 970 F.2d at 493 (emphasis added)."

*Id.*

The Sixth Circuit in this case blatantly misconstrues the foregoing. Despite paying lip service to the *McDonnell Douglas-Burdine-St. Mary's Honor Center* tripartite shifting-burdens approach, it conceived its role as reviewing court as searching the record for a preponderance of evidence establishing that age was the determining factor in the elimination of MR. HUTCHINSON's position. (Appendix B at 6; A-7). It concluded that, "Hutchinson has failed to produce any evidence" to sustain his burden of persuasion in that regard. (Appendix B at 6-7; A-7).

In light of the Sixth Circuit's recent decision in *Kline*, the panel that decided this case misconstrued its role

according to *St. Mary's Honor Center*. In *Kline*, the Sixth Circuit reversed a bench judgment against the plaintiff's claim of age discrimination. The Sixth Circuit concluded that, contrary to *St. Mary's Honor Center*, the United States District Court for the Eastern District of Tennessee, sitting as the factfinder, misinterpreted the ultimate burden of persuasion borne by plaintiffs in employment discrimination cases. *Kline*, *supra*, 1997 WL 631184 at *12. The Sixth Circuit observed:

> "In effect, the district court placed a nearly impossible burden on Kline requiring direct evidence of discrimination. Rarely can discriminatory intent be ascertained through direct evidence because rarely is such evidence available. This is the reason for the *McDonnell Douglas-Burdine* burden of proof mechanism, allowing a plaintiff to prove its case through circumstantial evidence."

*Id.*

Of paramount significance to this case, the District Court in *Kline* reached the same conclusion as did the Sixth Circuit here:

> "Intimating that the evidence used to establish the prima facie case was irrelevant, the [District C]ourt stated that '[t]here simply was no proof that discrimination was the reason Beckler was selected.'"

*Id.* at 13. The Sixth Circuit rejected that claim:

> "**This statement ignores the fact that some evidence of discrimination had to be ascertained in order for Kline to prove his prima facie case**. In fact, the issue of whether Kline established a prima facie case has never been in doubt. That Kline established his prima facie case has been implicitly and explicitly acknowledged both before this court in the first appeal

> and by the district court both in the initial proceeding and upon remand from this Court."

*Id.* (emphasis added).

In this case, the Sixth Circuit evaded the question of whether MR. HUTCHINSON established a prima facie case of age discrimination. Instead, it relied on a case preceding *St. Mary's Honor Center* that permitted a reviewing court to "'proceed directly to the ultimate question whether plaintiff has established discrimination'" "'when a case has been tried on the merits'". (Appendix B at 5; A-6, quoting *Brownlow* v. *Edgecomb Metals Co.*, 867 F.2d 960, 963 (6th Cir. 1989)). Since the jury returned a verdict in favor of MR. HUTCHINSON, it should be presumed that a prima facie case was presented.[2]

Thus, as in *Kline*, "some evidence of discrimination had to be ascertained" by MR. HUTCHINSON in this case. The Sixth Circuit's search for such evidence can only be interpreted as a search for direct evidence of age discrimination apart from the evidence presented in MR. HUTCHINSON's prima facie case. Regardless of the terminology used by the Sixth Circuit in this case, the effect of the Sixth Circuit's ruling is to resurrect the "pretext plus" doctrine rejected by this Court in *St. Mary's Honor Center*, *supra* as acknowledged by the Sixth Circuit in *Kline*, *supra*.

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**[2] The record in this case — largely acknowledged by the Sixth Circuit's opinion in this case — demonstrates that sufficient evidence of a prima facie case was presented: (1) Plaintiff was 59 years old when he ceased working for Citicorp Information Resources, Inc. ("Citicorp"), predecessor to Respondent FISERV-C.I.R., INC. (Appendix B at 3; A-4); (2) Plaintiff's job was eliminated by Citicorp (Appendix B at 3; A-4); (3) Plaintiff was qualified to perform his job as a senior account executive (Plaintiff's Brief on Appeal in the Sixth Circuit at 12-16 and citations to record therein); (4) Someone younger, JOHN URBAN, was selected over Plaintiff to remain as the sole senior account executive (Appendix B at 3; A-4).**

In so doing, the panel of the Sixth Circuit in this case not only scorns the work of their brethren on the Sixth Circuit bench but also defies the dictates of this Court. Rather than embark upon that crusade, the panel in this case should have limited itself to a determination of whether MR. HUTCHINSON presented enough evidence to create a genuine issue of material fact as to the credibility of Respondents' proffered nondiscriminatory reasons for the elimination of his job:

> "The evidence that established Kline's prima facie case, along with a rejection of the reasons offered by the defendant, would have been sufficient to allow the district court to infer discrimination on the part of TVA. **Implicit in Kline's prima facie case was a determination of whether he was qualified for the personnel officer position**. The district court erroneously determined that inferences drawn from Kline's prima facie case are unavailing and of no effect. **The *inferences* drawn from Kline's prima facie case along with a rejection of the reasons offered by the defendant to explain the adverse employment action, permit a factfinder to find the existence of discrimination.**"
>
> * * *
>
> "The Supreme Court [in *St. Mary's Honor Center*] determined that upon rejection of the reasons offered by the defendant an inference of discrimination is permitted and no additional proof of discrimination is required."

*Kline*, *supra*, 1997 WL 631184 at *7, *13 (italics in the original) (other emphasis added).

The utter failure of the panel in this case to follow the dictates of this Court in *St. Mary's Honor Center* and of the Sixth Circuit itself in the unfortunately-timed subsequent issuance of *Kline* constitutes just the sort of "depart[ure] from the accepted and usual course of

judicial proceedings * * * [so] as to call for an exercise of this Court's supervisory power".

Of equal significance, to the extent that the panel in this case reviewed the record to determine whether a genuine issue of material fact existed as to whether Respondents' proffered nondiscriminatory reasons were pretextual, its efforts were fatally tainted by the panel's failure to abide by well-established procedural rules for review of a denial of a motion for judgment as a matter of law. The United States Court of Appeals for the Eighth Circuit has stated those rules with succinctness:

> "On appeal our task is limited. We must (1) consider the evidence in the light most favorable to [the plaintiff]; (2) assume that all conflicts in the evidence were resolved by the jury in [the plaintiff's] favor; (3) assume [the plaintiff] proved all the facts his evidence tends to prove; (4) give [the plaintiff] the benefit of all favorable inferences that may reasonably be drawn from the facts proved; and (5) affirm the denial of the motion for judgment as a matter of law if reasonable persons could differ as to the conclusions to be drawn from the evidence."

*Gaworski* v. *ITT Commercial Finance Corp.*, 17 F.3d 1104, 1108 (8th Cir. 1994).[3]

In this case, the Sixth Circuit simply applied the converse of those rules. In assessing whether a genuine issue of material fact exists on the question of pretext, where the evidence raises a question of the believability and not the propriety of the proffered nondiscriminatory reasons for the adverse employment action, the issue is properly left for jury consideration. *Gaworski*, *supra*, at 1110.

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[3] **Accord: *E.E.O.C.* v. *Ethan Allen, Inc.*, 44 F.3d 116, 119 (2nd Cir. 1994); *Nelson* v. *Boatmen's Bancshares, Inc.*, 26 F.3d 796, 800 (8th Cir. 1994).**

Such evidence was presented in *Kline*, *supra*. There, the defendant contended that the non-selection of the plaintiff in 1991 was based on a draft job description of the position at issue. However, there was testimony to the effect that the job description was destroyed two years earlier in 1989. The Sixth Circuit found it "curious how the parties who were conducting the reselection process in 1991 could have relied on a draft job description that was allegedly destroyed in July 1989". 1997 WL 631184 at *14. Such evidence was sufficient to permit a reasonable jury to infer that the proffered reasons of the defendant were pretextual. Indeed, they rose to the level of "a suspicion of mendacity" to which this Court referred in *St. Mary's Honor Center*.

The same type of evidence was presented in this case. Respondents' credibility was directly challenged by its behavior with respect to its policy manual. Respondents claimed that seniority was not a factor in determining who would be "job discontinued." (TR Vol IV at 46-47). However, testimony from FISERV personnel contradicted that assertion. FISERV personnel testified that seniority was the heaviest weighted factor when determining who would be "job discontinued". (TR Vol IV at 24-27). FISERV personnel also acknowledged that the existence of testimony in prior litigation to the effect that the termination of one of the account executives in another employment action was due entirely to the fact that he was the **least** senior Account Executive. (TR Vol IV at 49-50). Indeed, as was the relative case between MR. HUTCHINSON and the person who replaced him, the terminated account executive had the least seniority but not the lowest performance ranking.

Documentary evidence to support MR. HUTCHINSON's claim was provided by the aforementioned policy manual — a document offered into evidence by Respondents that establishes seniority as the first consideration when determining job discontinuance. (TR Vol IIb at 47; TE #71 at § 2/9, p 2). Of equal significance, despite the

fact that Respondents introduced the policy manual into evidence, it was Respondents that eventually attempted to impeach its relevance by attempting to prove that the policy manual was not applicable to the facility where MR. HUTCHINSON was employed. (TR Vol IV at 133-135). **In and of itself**, that maneuver would be sufficient to raise a genuine issue of material fact as to the believability of Respondents' proffered explanations for its actions.[4] Indeed, as the United States Court of Appeals for the Second Circuit observes:

> "Resort to a pretextual explanation is, like flight from the scene of the crime, evidence indicating consciousness of guilt, which is, of course, evidence of illegal conduct."

*Binder* v. *Long Island Lighting Co.*, 57 F.3d 193, 200 (2nd Cir. 1995).[5]

In this case, however, additional evidence was adduced from which a jury could reasonably conclude that Respondents' proffered explanation of "economic necessity" was pretextual:

1. Respondent MURPHY-MOLLOY systematically removed MR. HUTCHINSON's supervisory responsibil-

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4 As a substantive matter, Respondents' maneuver also lacked credibility since it was Respondents that had established that the policy manual was, indeed, applicable to C.I.R. Troy. (TR Vol IIb at 46-47). See also *Barbour* v. *Merrill*, 49 F.3d 1270 (D.C. Cir. 1995).

5 Referring to that quotation, the Third Circuit surmised:

> "We presume that the same logic, albeit unarticulated, was the basis for the Supreme Court's statement in *Hicks* that disbelief of the employer's reason will permit the factfinder to infer the ultimate fact of discrimination, 509 U.S. at 511, 113 S.Ct. at 2749, even though the presumption of discrimination 'drops from the case' after the employer proffers a legitimate reason for its actions. *Burdine*, 450 U.S. at 255 n.10, 101 S.Ct. at 1095 n.10."

*Sheridan* v. *E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1069 (3rd Cir. 1996).

ities and gave them to younger people. (TR Vol Ib at 64-72; TE #33). These are not instances where a single replacement by a younger employee "stands alone"; rather, they occurred in a systematic pattern. See *E.E.O.C.* v. *Ethan Allen, Inc.*, 44 F.3d 116 (2nd Cir. 1994).

2. While still in a supervisory position, MR. HUTCHINSON hired and trained Ms. Molly Maginity who at the time was in her twenties. (TR Vol IIa at 8-9). MR. HUTCHINSON was shortly thereafter demoted by Respondent MURPHY-MOLLOY to the position of Senior Account Executive and was replaced by Ms. Maginity to whom he was now required to report. (*Id.*; TR Vol Ib at 55-56, 76-77; TE #52). Petitioner was told by Respondent MURPHY-MOLLOY that he preferred Ms. Maginity reporting to him. (TR Vol IIa at 45-49). See *Washington* v. *Garrett*, 10 F.3d 1421 (9th Cir. 1993).

3. In **addition** to being younger than MR. HUTCHINSON, JOHN URBAN — who was retained when MR. HUTCHINSON's job was terminated — was not as qualified for the position as MR. HUTCHINSON. MR. HUTCHINSON was the one who handled the key accounts. (TR Vol Ia at 80; TR Vol IIa at 11, 63, 76, 83-85; TR Vol IV at 97, 102-103, 118). MR. HUTCHINSON was also the one the other account executives went to when they had problems. (TR Vol IIa at 64-65; TR Vol IV at 93-94). MR. HUTCHINSON was even responsible for getting some of MR. URBAN's largest accounts to sign long term contracts. (TR Vol IIa at 37-38, 83-85; TE #39). See *Seman* v. *Coplay Cement Co.*, 26 F.3d 428 (3rd Cir. 1994).

4. The first documented act of Respondent MURPHY-MOLLOY as Petitioner's supervisor was to send a monthly letter to headquarters which put MR. HUTCHINSON in a false bad light. (TR Vol Ib at 30-34; TE #26). See *Shaw* v. *H.C.A. Health Services of Midwest, Inc.*, 79 F.3d 99 (8th Cir. 1996).

5. Respondent MURPHY-MOLLOY falsely accused MR. HUTCHINSON of taking kickbacks with regard to purchases made for the facility. (TR Vol Ib at 57-59). See *Shaw*, *supra*.

6. Respondent MURPHY-MOLLOY's first evaluation of MR. HUTCHINSON's performance was the worst Petitioner had ever received and on some of the appraisal points false comments were made and the overall ranking was simply wrong. (TR Vol IIa at 13-34; TE #38). See *Shaw*, *supra*; *Gaworski*, *supra*.

None of this evidence is recounted in the Sixth Circuit's opinion in this case because the panel improperly reviewed the evidence in the light most favorable to Respondents. The panel first employed the proverbial straw-man technique:

> "Hutchinson argues that his various transfers and subsequent replacement by younger employees indicate that the defendants discriminated against him on the basis of his age. However, an individual's replacement by a younger employee, **standing alone**, is insufficient to raise an inference of age discrimination under Michigan law. *See Barnell* [v. *Taubman Co., Inc.*, 203 Mich.App. 110, 512 N.W.2d 13, 19 (1993)]."

(Appendix B at 7; A-7–A-8) (emphasis added).

However, the fact that a younger employee was retained in place of Petitioner does **not** stand alone. The record includes evidence that the retention of MR. URBAN violated company policy regarding reductions-in-force, a policy enforced in other such employment actions. That evidence was sufficient to create a jury-submissible issue.

Virtually acting as an advocate for Respondents, the panel then set out to refute that contention:

> "Even if Hutchinson is correct that employees with seniority should be accorded certain preferences under Citicorp's policy manual, **the manual does not state that the company is required to retain less competent employees merely because of their seniority**."

(Appendix B at 7; A-8) (emphasis added). The significance of that fact to the panel was that "[t]he **defendants** note that Urban was rated higher than any other senior executive on the 1989 performance appraisal; he was the only senior account executive to receive a rating of 'outstanding'." (Appendix B at 7; A-8) (emphasis added).

Notably absent from that Court's opinion is any effort to search the record to determine whether evidence was presented from which a jury could reasonably conclude that MR. HUTCHINSON was not less competent — in any meaningful sense — than MR. URBAN. Such evidence exists — in exhaustive detail. (Plaintiff's Brief on Appeal at 12-16).[6]

Ignoring that evidence, the panel in this case proceeded to discuss the hiring of MR. BARAGE by Respondent FISERV contemporaneously with its formal severance of ties with Petitioner. (Appendix B at 8; A-9).The panel found that such evidence did not create "an inference of age discrimination in this case". (Appendix B at 8; A-9). The panel could reach that conclusion only by focusing on evidence presented by Respondents in the light most favorable to Respondents:

> "However, **Citicorp** notes that its financial situation greatly improved between June, 1989, when it discharged four of the five senior account

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**6 In view of the presentation contained in Plaintiff's Brief, the suggestion of the panel in this case that "Hutchinson does not challenge the impartiality of that judgment" (Appendix B at 7-8; A-8) is quixotic at best.**

> executives, and February 1990, when it decided to hire Barage."

(Appendix B at 8; A-9) (emphasis added).

However, given the fact that the record demonstrates that the proffered explanation for that decision — the improved economic outlook for Citicorp — was due to the work MR. HUTCHINSON had performed before being severed (TR Vol IV at 124-125), a jury could reasonably conclude that the failure to rehire the architect of the improved economic position of Respondent and the hiring of a younger person instead were motivated by considerations of age discrimination.

In light of the foregoing, the Sixth Circuit's unabashed conclusion "that a reasonable person **could not have concluded** that age was a determining factor in Citicorp's decision to eliminate Hutchinson's position" is sheer sophistry, made possible only by a refusal to evaluate the record according to universally-followed standards of review. (Appendix B at 8; A-9) (emphasis added). Once again, the performance of the panel in this case, in blatantly disregarding those standards, calls into question the entire foundational basis for its ultimate holding. As in the case of the panel's disregard of the appropriate evidentiary standards, the panel's action represents such a "depart[ure] from the accepted and usual course of judicial proceedings * * * [so] as to call for an exercise of this Court's supervisory power". In this case, more than sufficient evidence was adduced to raise a genuine issue of material fact as to the believability of Respondents' proffered reasons for their challenged actions. As the United States Court of Appeals for the Third Circuit observed:

> "The district court must determine whether the plaintiff has cast sufficient doubt upon the employer's proffered reasons to permit a reasonable factfinder to conclude that the reasons are incredible[.]"

* * *

> "But once the court is satisfied that the evidence meets this threshold requirement, **it may not pretermit the jury's ability to draw inferences from the testimony, including the inference of intentional discrimination drawn from an unbelievable reason proffered by the employer.**"

*Sheridan* v. *E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1072 (3rd Cir. 1996) (emphasis added).[7]

## CONCLUSION

By its holding in *Kline* v. *T.V.A.*, *supra*, the Sixth Circuit has affirmed its adherence to the evidentiary standards enunciated by this Court in *St. Mary's Honor Center* and the standards of review adhered to by the various Circuit Courts of Appeals. *Kline*, however, postdated the order denying MR. HUTCHINSON's Petition for Rehearing in that Court.

Petitioner is acutely aware that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law". Sup. Ct. R. 10. However, at the time it issued its order denying MR. HUTCHINSON's Petition for Rehearing, the Sixth Circuit panel had not properly delineated the evidentiary standards appropriate to this case. At that time, the Sixth Circuit panel stood apart from the decisions of this Court and the various Circuit Courts of Appeals that had

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7 **The Eighth Circuit has reached the same conclusion:**

> **"Thus, if (1) the elements of a prima facie case are present, and (2) there exists sufficient evidence for a reasonable jury to reject the defendant's proffered reasons for its actions, then the evidence is sufficient to allow the jury to determine whether intentional discrimination has occurred, and we are without power to reverse the jury's finding."**

***Gaworski, supra*, 17 F.3d at 1109 (emphasis added).**

properly characterized them. With the issuance of its opinion in *Kline*, the Sixth Circuit has made it clear that the panel in this case did not even properly delineate the controlling evidentiary standards in its own circuit.

It is, therefore, appropriate to request that this Court exercise its supervisory power to redress the manifest errors of the Sixth Circuit in this case, errors of such an egregious nature as to constitute a "depart[ure] from the accepted and usual course of judicial proceedings". In the wake of *Kline*, however, it is not necessary to grant full plenary consideration to address what appeared to be significant discrepancies as to these issues between the Sixth Circuit and this Court and the other Circuit Courts of Appeals. This Court can exercise its supervisory power pursuant to Sup. Ct. R. 16.1 by entering a summary disposition on the merits in which it VACATES the opinion of the Sixth Circuit in this case and REMANDS this case to the Sixth Circuit for consideration of Respondents' appeal in light of *Kline* and for plenary consideration of MR. HUTCHINSON's cross-appeal to that Court.

Respectfully submitted,

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Dated:
November 10, 1997

# APPENDICES TO PETITION FOR CERTIORARI

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## APPENDIX A

### ORDER

(United States Court of Appeals — Sixth Circuit)

(Filed August 12, 1997)

(KENNETH HUTCHINSON, Plaintiff-Appellee Cross-Appellant, v. FISERV CIR, INC., a successor to Citicorp Information Resources, Inc.; BRIAN MURPHY-MOLLOY, Jointly and Severally, Defendants-Appellants Cross-Appellees — Case No: 95-1821; 95-1897)

BEFORE: MERRITT, COLE and GODBOLD*, Circuit Judges

Upon consideration of the petition for rehearing filed by the Appellee/Cross-Appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

*ENTERED BY ORDER OF THE COURT*

Leonard Green,
Clerk

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*** The Honorable John C. Godbold, United States Circuit Judge for the Eleventh Circuit, sitting by designation.**

## APPENDIX B

### ORDER
*-NOT RECOMMENDED FOR PUBLICATION-*

(United States Court of Appeals — Sixth Circuit)

(Filed July 8, 1997)

(KENNETH HUTCHINSON, Plaintiff-Appellee and Cross-Appellant, v. FISERV CIR, INC., and BRIAN MURPHY-MOLLOY, Defendants-Appellants and Cross-Appellees — NOS. 95-1821/95-1897; On Appeal from the United States District Court for the Eastern District of Michigan)

BEFORE: MERRITT, COLE and GODBOLD*, Circuit Judges

*PER CURIAM.*

The defendants appeal the district court's denial of their motion for judgment as a matter of law on the plaintiff's age discrimination claim. In his cross-appeal, the plaintiff appeals the district court's (1) dismissal of his claim for the diminution in value of his retirement benefits; and (2) refusal to instruct the jury as to future wage loss. For the following reasons, we **REVERSE** the district court's denial of the defendants' motion for judgment as a matter of law and **REMAND** the case to the district court with instructions to enter judgment in favor of the defendant as to all issues.

*I.*

Plaintiff Kenneth Hutchinson (Hutchinson) was employed by Citicorp Information Resources, Inc. (Citicorp) and its predecessors from 1962 until his severance in 1989. During that period, Citicorp and its predecessors provided data processing services to credit unions. In 1986, Hutchinson, one of three committee members managing Citicorp's Troy, Michigan branch, suggested that the company change its manage-

ment structure from a committee-based approach to a single branch manager.

As Hutchinson had suggested, Citicorp eliminated the committee-based approach it had used at the Troy facility and decided to vest managerial control over that branch's operations in a single "data center manager." In June 1986, Defendant Brian Murphy-Molloy (Murphy-Molloy) was selected as the data center manager of the Troy facility. At that time, Murphy-Molloy was in his mid-thirties and Hutchinson was fifty-six years old. After Murphy-Molloy became the data center manager, Hutchinson was given the title of "conversion and training manager."

Problems soon arose between Hutchinson and Murphy-Molloy. According to Hutchinson, Murphy-Molloy sent negative reports to headquarters regarding Hutchinson's performance, accused Hutchinson of taking kickbacks from company purchasers, and gradually removed Hutchinson's supervisory responsibilities. In March 1987, Hutchinson was reassigned to the position of senior account executive and required to report to the new conversion and training manager, Molly Maginity (Maginity), a woman in her twenties. Murphy-Molloy testified that he gave the position to Maginity because she had better management skills than Hutchinson. Murphy-Molloy also testified that he assigned Hutchinson to be a senior account executive so that he could concentrate on convincing key clients to use Citicorp's new operating system. Shortly thereafter, Maginity's authority over the senior account executives was removed and given to two different men, Charles Smith and Wesley Vasey. Smith had been one of three people, along with Hutchinson, who had managed the Troy facility prior to Murphy-Molloy's appointment as data center manager. Similarly, Vasey had once been the branch manager of Citicorp's Seattle, Washington data center until it was closed due to economic difficulties. Despite these changes, Hutchinson's salary was not affected.

From 1986 to 1989, Citicorp experienced severe economic problems at several of its branches, forcing it to close offices in South Carolina, California and Washington, and to lay off more than 100 employees. Although the Michigan branch was not closed, the company eliminated approximately thirteen positions at that branch between 1988 and 1989, discharging all but one of its five senior account executives. Citicorp eliminated the jobs of Elbert Montgomery, Mark Pastula, James Jeffries and Hutchinson, but chose to retain one senior account executive, John Urban, citing Urban's superior performance ratings.

After eliminating his position, Citicorp offered Hutchinson his choice of (1) accepting an alternative position with the company, or (2) taking early retirement with a severance package. Of the discharged senior account executives, Hutchinson was the only one offered an alternative position with the company. However, both the positions offered to Hutchinson required him to take a cut in pay and complete a ninety-day probationary period. If Hutchinson failed to complete successfully the ninety-day period, he would be terminated without any of the benefits provided in the severance package. Not wishing to risk the benefits offered in his severance package, Hutchinson declined the alternative positions, accepted early retirement, and ceased working for Citicorp in August 1989. However, Hutchinson's retirement was not effective until March 1, 1990.

On October 1, 1989, Robert Miotke replaced Murphy-Molloy as the manager of the Troy facility. By late February 1990, Citicorp's economic outlook improved and it hired Dick Barage, 46, as a new senior account executive.

On April 18, 1991, Hutchinson filed the present suit in the Oakland County, Michigan Circuit Court, alleging that his termination violated the Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101 *et seq.* Specifically, Hutchinson alleged that he had been the victim of age discrimination, causing him to suffer the loss of his

job, diminution in the value of his retirement benefits, and loss of future wages. Thereafter, Defendants Murphy-Molloy and Citicorp[1] removed this action on the basis of diversity of citizenship to the United States District Court for the Eastern District of Michigan. Upon the defendants' motion, the district court dismissed Hutchinson's claim for the diminution in the value of his retirement benefits, holding that such a claim was preempted by the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.*

The parties tried the case before a jury from April 11 to April 19, 1995. The defendants moved the district court for a directed verdict at the close of Hutchinson's case and again at the close of their own case, but the district court denied the motions. The district court also denied Hutchinson's request to charge the jury as to future wage loss. Subsequently, the jury found in favor of Hutchinson and awarded him $800,000 — $257,000 in lost wages and $543,000 in non-economic damages. The defendants filed post-trial motions to obtain a new trial, to amend the judgment, and to obtain judgment as a matter of law. The district court denied all the defendants' motions and entered judgment on the basis of the jury award.

The parties have timely appealed the judgment of the district court.

*II.*

In reviewing the district court's denial of the defendants' motion for a judgment as a matter of law, we must determine whether the evidence, when viewed in a light most favorable to Hutchinson, would permit a reasonable jury to find that his discharge was moti-

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**[1] In 1991, Citicorp was acquired by another company, Fiserv, and is currently operating under the name of "Fiserv-CIR, Inc." Because Fiserv-CIR, Inc. is the successor in liability to Citicorp, we refer to this defendant as, simply, "Citicorp."**

vated by age discrimination. *See Wilson* v. *Firestone Tire & Rubber Co.*, 932 F.2d 510, 513 (6th Cir. 1991); *Matras* v. *Amoco Oil Co.*, 385 N.W.2d 586, 588-89 (Mich. 1986).

In diversity cases, federal courts apply state substantive law. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938). We therefore look to Michigan law, which provides that Michigan courts consider federal law when reviewing claims of age discrimination based on state law. *Plieth* v. *St. Raymond Church*, 534 N.W.2d 164, 167 (Mich. Ct. app. 1995) (citation omitted). Accordingly, we evaluate Hutchinson's age discrimination claim under both Michigan law and federal law.

*III.*

The defendants first contend that Hutchinson failed to establish a prima facie case of age discrimination and, thus, argue that the district court erred in denying their motion for a judgment as a matter of law. However, "it is now firmly established in this circuit that when a case has been tried on the merits, a reviewing appellate court need not address the sufficiency of plaintiff's prima facie case, and may instead proceed directly to the ultimate question whether plaintiff has established discrimination." *Brownlow* v. *Edgecomb Metals Co.*, 867 F.2d 960, 963 (6th Cir. 1989). Because this case has already proceeded to trial on the merits and resulted in a jury verdict for Hutchinson, we now consider whether Hutchinson "met his ultimate burden of persuasion regarding his age discrimination claim." *Simpson* v. *Midland-Ross Corp.*, 823 F.2d 937, 942 (6th Cir. 1987) (citing *Ridenour* v. *Lawson Co.*, 791 F.2d 52, 57-58 (6th Cir. 1986); *Wilkins* v. *Eaton Corp.*, 790 F.2d 515, 523 (6th Cir, 1986); *see Plieth* v. *St. Raymond Church*, 534 N.W.2d at 167.

*IV.*

The defendants next contend that the district court erred in denying their motion for judgment as a matter

of law because Hutchinson failed to prove that age was a determining factor in their decision to eliminate Hutchinson's job. We agree.

If a plaintiff successfully establishes a prima facie case of age discrimination,[2] the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's discharge." *LaPointe* v. *United Autoworkers Local 600*, 8 F.3d 376, 379 (6th Cir. 1993); *see Barnell* v. *Taubman Co., Inc.*, 512 N.W.2d 13, 19 (Mich. Ct. App. 1993); *see also Plieth*, 534 N.W.2d at 167. "Once the employer articulates a legitimate, non-discriminatory business reason for its action, any presumption of discrimination drops from the case, and the burden of persuasion rests squarely on the plaintiff" to show by a preponderance of the evidence that "age was a determining factor in the adverse action that the employer took against him." *Wilson*, 932 F.2d at 514; *see Barnell*, 512 N.W.2d at 19. Under Michigan law, "age is a determining factor when the unlawful adverse action would not have occurred without age discrimination." *Matras*, 385 N.W.2d at 589.

Hutchinson has failed to produce any evidence that age was a determining factor in the elimination of his job. *See Wilson*, 932 F.2d at 514; *Matras*, 385 N.W.2d at 589; *Plieth*, 534 N.W.2d at 167. Hutchinson admits that there is no direct evidence that he was discriminated against on the basis of his age, but argues that a "plethora of circumstantial evidence" exists that shows "a continuing course of discriminatory conduct." Specifically, Hutchinson argues that his various transfers and subsequent replacement by younger employees indicate that the defendants discriminated against him on the

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**2 In order to establish a prima facie case of age discrimination under Michigan law, a plaintiff must show that (1) he was a member of the protected class; (2) he suffered an adverse employment action; (3) he was qualified for his particular position; and (4) he was replaced by someone younger. *See Matras*, 385 N.W.2d at 589; *see also* Mich. Comp. Laws § 37.2202(1)(a).**

basis of age. However, an individual's replacement by a younger employee, standing alone, is insufficient to raise an inference of age discrimination under Michigan law. *See Barnell*, 512 N.W.2d at 19.

Hutchinson also argues that Citicorp's elimination of his job and retention of John Urban constituted evidence of the defendants' discriminatory intent. Specifically, Hutchinson argues that Citicorp violated its seniority policy by discharging him — an employee with nearly thirty years' experience — while retaining Urban, a younger employee with less seniority. Even if Hutchinson is correct that employees with seniority should be accorded certain preferences under Citicorp's policy manual, the manual does not state that the company is required to retain less competent employees merely because of their seniority. The defendants note that Urban was rated higher than any other senior account executive on the 1989 performance appraisal; he was the only senior account executive to receive a rating of "outstanding." In fact, Hutchinson himself had once rated Urban an "outstanding" employee and stated that he had no reason to doubt that Urban had continued to perform at that level. More importantly, Hutchinson testified that he did not believe that Vasey, the person who completed his and Urban's evaluations in 1989 and who recommended that Hutchinson's job be eliminated, had ever discriminated against him on the basis of his age. Because Urban was judged the more competent of the two employees and Hutchinson does not challenge the impartiality of that judgment, Hutchinson has failed to demonstrate how Urban's retention constituted age discrimination.

Finally, Hutchinson contends that Citicorp's articulated reason for discontinuing his position — economic necessity — is belied by the company's hiring of a new senior account executive, Dick Barage, approximately ten months later. Noting that Barage was only forty-six years old when he was hired, Hutchinson suggests that the elimination of his job was motivated by age discrim-

ination rather than Citicorp's economic problems. However, Citicorp notes that its financial situation greatly improved between June 1989, when it discharged four of the five senior account executives, and February 1990, when it decided to hire Barage. Also, Citicorp notes that Hutchinson neither expressed any discrimination with his retirement nor any interest in returning to work at Citicorp; he never sought the position that Barage was hired to fill. Accordingly, the mere fact that Hutchinson was ultimately succeeded by a younger individual is not sufficient to raise an inference of age discrimination in this case. *See Barnell*, 512 N.W.2d at 121-22; *see also Lilley v. BTM Corp.*, 958 F.2d 746, 752 (6th Cir. 1992) (holding that the hiring of a younger employee, nine months after the plaintiff was terminated, was not "in any sense relevant to inferring age-based discrimination").

After reviewing all the evidence and inferences therefrom in the light most favorable to Hutchinson, we believe that a reasonable person could not have concluded that age was a determining factor in Citicorp's decision to eliminate Hutchinson's position. *See Wilson*, 932 F.2d at 514; *Matras*, 385 N.W.2d at 589; *Barnell*, 512 N.W.2d at 19. Because Hutchinson failed to raise any inference of age discrimination, we conclude that the district court erred in denying the defendants' motion for judgment as a matter of law.[3]

*V.*

For the above reasons, we REVERSE the district court's denial of the defendants' motion for judgment as a matter of law and REMAND the case to the district court with instructions to enter judgment in favor of the defendants. In light of this determination, plaintiff's cross-appeal is hereby dismissed as moot.

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**3 Because the issues raised in Hutchinson's cross-appeal regarding his entitlement to damages for the loss of future wages and the diminution in value of his retirement benefits are premised on a finding of age discrimination, we need not address the merits of these issues.**

## APPENDIX C

### ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Session of June 26, 1995)

(KENNETH HUTCHINSON, Plaintiff, v FISERV C.I.R., INC., successor to CITICORP INFORMATION RESOURCES, INC. and BRIAN MURPHY MOLLOY, Jointly and Severally, Defendants — Case No. 91 CV 73164 DT; Hon. Anna Diggs Taylor (P 12773))

At a session of said Court held in the City of Detroit, County of Wayne, State of Michigan, on *June 26, 1995.*

PRESENT: Honorable *Anna Diggs Taylor,*
District Court Judge

This court having read Defendants' Motion For Judgment as a Matter of Law, Or In The Alternative, For New Trial, Motion For Remittitur And/Or Amend The Judgment, and Motion To Stay Execution Of Judgment, and their supporting documents; and having reviewed Plaintiff's responsive pleadings and Defendants' reply; and there having been a hearing on the motion on Monday June 26, 1995, at which all parties were represented by counsel, and the court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that Defendants' Motion for Remittitur And/Or Amend The Judgment is denied.

/s/ *Anna Diggs Taylor*
District Court Judge

Approved as to form only
Robert C. Ludolph
Charles A. Butler

## APPENDIX D

### ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Session of June 26, 1995)

(KENNETH HUTCHINSON, Plaintiff, v FISERV C.I.R., INC., successor to CITICORP INFORMATION RESOURCES, INC. and BRIAN MURPHY MOLLOY, Jointly and Severally, Defendants — Case No. 91 CV 73164 DT; Hon. Anna Diggs Taylor (P 12773))

At a session of said Court held in the City of Detroit, County of Wayne, State of Michigan, on *June 26, 1995.*

PRESENT: Honorable *Anna Diggs Taylor,*
District Court Judge

This court having read Defendants' Motion For Judgment as a Matter of Law, Or In The Alternative, For New Trial, Motion For Remittitur And/Or Amend The Judgment, and Motion To Stay Execution Of Judgment, and their supporting documents; and having reviewed Plaintiff's responsive pleadings and Defendants' reply; and there having been a hearing on the motion on Monday June 26, 1995, at which all parties were represented by counsel, and the court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that Defendants' Motion For Judgment as a Matter of Law, Or In The Alternative, For New Trial is denied.

/s/ *Anna Diggs Taylor*
District Court Judge

Approved as to form only
Robert C. Ludolph, Charles A. Butler

## APPENDIX E

### ORDER OF JUDGMENT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Session of April 26, 1995)

(KENNETH HUTCHINSON, Plaintiff, v FISERV C.I.R., INC., successor to CITICORP INFORMATION RESOURCES, INC. and BRIAN MURPHY MOLLOY, Jointly and Severally, Defendants — Case No. 91 CV 73164 DT; Hon. Anna Diggs Taylor (P 12773))

At a session of said Court held in the City of Detroit, County of Wayne, State of Michigan, on *April 26, 1995.*

PRESENT: Honorable *Anna Diggs Taylor,*
District Court Judge

This matter having been tried by a jury and the jury having returned a verdict in favor of the Plaintiff in the amounts of Two Hundred Fifty Seven Thousand ($257,000) Dollars for loss wages and Five Hundred Forty Three Thousand ($543,000) Dollars for non-economic damages;

IT IS HEREBY ORDERED that judgment is entered in the above captioned matter for Plaintiff against the Defendants, jointly and severally, in the amount of Eight Hundred Thousand ($800,000) Dollars.

IT IS FURTHER ORDERED that interest on the judgment shall accrue and be paid according to 28 USC § 1961.

/s/ *ANNA DIGGS TAYLOR*
District Court Judge

## APPENDIX F

### PLAINTIFF'S FIRST AMENDED COMPLAINT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Filed August 21, 1991)

(KENNETH HUTCHINSON, Plaintiff, v FISERV C.I.R., INC., successor to CITICORP INFORMATION RESOURCES, INC. and BRIAN MURPHY MOLLOY, Jointly and Severally, Defendants — Case No. 91 73164)

NOW COMES Plaintiff, by and through his attorneys, ALLEN J. COUNARD, P.C., by Charles A. Butler, and for his Complaint states as follows:

1. That the amount in controversy is in excess of Ten Thousand ($ 10,000.00) Dollars.

2. That at all times pertinent to this Complaint, Defendant Fiserv C.I.R., Inc. (hereinafter Fiserv) is a Delaware Corporation doing business in the County of Oakland, State of Michigan.

3. That at all times pertinent to this Complaint, Defendant Brian Murphy-Molloy resides in the County of Oakland, State of Michigan.

4. That Plaintiff was a Conversion and Training Manager with a company known as Computer Professionals Unlimited when C.P.U. was bought out by Citicorp Information Resources, Inc. (hereinafter C.I.R.).

5. That Plaintiff was then hired into the same position with C.I.R.

6. That Plaintiff was later promoted to the position of Data Center Manager at C.I.R.'s Troy branch.

7. That Plaintiff's birthdate is February 25, 1930.

8. That in June of 1986, C.I.R. demoted Plaintiff to the Conversion and Training Manager position and put Defendant Murphy-Molloy in the Data Center Manager position.

9. That Defendant Murphy-Molloy was then partly responsible for re-writing job qualifications for the people at C.I.R.'s Troy branch to include, inter alia, college degrees.

10. That the purpose for requiring, inter alia, college degrees and other qualifications was to keep the older employees from being promoted or changing position.

11. That in 1987 Defendant Murphy-Molloy demoted Plaintiff to the position of Account Executive Manager.

12. That Plaintiff was again demoted by Defendant Murphy-Molloy to the position of Senior Account Executive.

13. That each time Plaintiff was demoted he was replaced by someone in their 20's or 30's.

14. That in June, 1988 Plaintiff was given an ultimatum to either resign and receive his severance benefits or take a demotion with a forty (40%) percent pay cut.

15. That the new position would have required Plaintiff to be on the road eighty (80%) percent of the time and, if Plaintiff was thereafter terminated, he would lose all severance benefits.

16. That Plaintiff was forced to accept resignation so as not to lose his medical benefits.

17. That Plaintiff was constructively discharged.

18. That C.I.R. owed the following duties to Plaintiff and others similarly situated.

a). To refrain from discriminating against Plaintiff on account of his age;

b). To refrain from discriminating against Plaintiff with regard to the terms and conditions of his employment on account of his age;

c). To refrain from determining Plaintiff's job assignments because of his age;

d). To refrain from demoting Plaintiff on account of his age;

e). To refrain from constructively terminating Plaintiff on account of his age.

19. That C.I.R. breached each of the above-mentioned duties by:

a). Failing to refrain from discriminating against Plaintiff on account of his age;

b). Failing to refrain from discriminating against Plaintiff with regard to the terms and conditions of his employment on account of his age;

c). Failing to refrain from determining Plaintiff's job assignments because of his age;

d). Failing to refrain from demoting Plaintiff on account of his age;

e). Failing to refrain from constructively terminating Plaintiff on account of his age.

20. That Defendant Fiserv is the successor company of C.I.R. and has assumed any potential liabilities for the claims alleged in the instant matter as they pertain to C.I.R.

21. That Defendant Murphy-Molloy owed the following duties to Plaintiff and other similarly situated:

a). To refrain from discriminating against Plaintiff on account of his age;

b). To refrain from discriminating against Plaintiff with regard to the terms and conditions of his employment on account of his age;

c). To refrain from determining Plaintiff's job assignments on account of his age;

d). To refrain from demoting Plaintiff on account of his age;

e). To refrain from constructively discharging Plaintiff on account of his age.

22. That Defendant Murphy-Molloy breached each of the above-mentioned duties by:

a). Failing to refrain from discriminating against Plaintiff on account of his age;

b). Failing to refrain from discriminating against Plaintiff with regard to the terms and conditions of his employment on account of his age;

c). Failing to refrain from determining Plaintiff's job assignments on account of his age;

d). Failing to refrain from demoting Plaintiff on account of his age;

e). Failing to refrain from constructively discharging Plaintiff on account of his age.

23. That Defendants' above-mentioned breaches of duty are each a violation of the Elliott-Larsen Civil Rights Act, M.C.L. § 37.2101 et. seq.

24. That the discriminatory acts and/or omissions as set forth herein of C.I.R.'s employees, agents and/or representatives were done within the scope of their employment and were condoned, authorized and/or ratified by C.I.R.

25. That C.I.R. is liable for the discriminatory acts and/or omissions of its employees, agents and/or representatives as set forth herein pursuant to the Doctrine of Respondeat Superior.

26. That the discriminatory acts and/or omissions as described herein were part of a continuing course of discriminatory conduct against Plaintiff.

27. That upon being hired in 1986 by C.I.R., Defendant Murphy Molloy engaged in a continuing course of conduct which discriminated against Plaintiff on account of his age.

28. That the discriminatory acts and/or omissions set forth herein were done in the furtherance of a policy of discrimination in force with C.I.R.

29. That Plaintiff's employment relationship with C.I.R. required that C.I.R., its employees, agents and/or representatives have good cause for terminating Plaintiff.

30. That Plaintiff's constructive discharge was without good cause.

31. That Plaintiff's constructive discharge was a breach of the employment contract between he and C.I.R.

32. That as a direct and proximate result of Defendants' joint and several discriminatory acts and/or omissions, Plaintiff has suffered, and will continue to suffer in the future, loss of wages and benefits, loss of earning capacity, loss of enjoyment of social pleasures, fear, shock, embarrassment, humiliation, mortification, severe emotional distress, and mental anguish and other injury and damages and any and all other injuries and damages allowable by law.

WHEREFORE Plaintiff prays this Court enter a judgment against Defendants, jointly and severally, in whatever amount in excess of Ten Thousand ($ 10,000.00) Dollars Plaintiff is found to be entitled to including costs, interest, and attorney fees.

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Dated: _____

Supreme Court, U.S.
FILED
DEC 15 1997
CLERK

No. 97-807

In The

# Supreme Court of the United States

October Term, 1997

KENNETH HUTCHINSON,

*Petitioner,*

*vs.*

FISERV C.I.R., INC. and BRIAN MURPHY-MOLLOY,

*Respondents.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals, after reviewing the record for Petitioner's ultimate burden of proving intentional discrimination, properly reversed the district court's denial of Respondents' motion for judgment as a matter of law and remanded the case to the district court for entry of judgment in favor of Respondents.

## STATEMENT PURSUANT TO RULE 29.6

The parent company of Respondent Fiserv C.I.R., Inc. is Fiserv Inc. and its only nonwholly owned subsidiary is P.T. Fiserv Indonesia.

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I

## INTRODUCTION

Petitioner has attempted to cloud the lack of proof of any age discrimination in this case by seeking certiorari based on rhetoric that contains no substantive merit. The case involves the application, under diversity jurisdiction, of a Michigan discrimination statute to the facts as presented. While the federal authority applied and analyzed in this unpublished decision is persuasive authority under the Michigan Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101, *et seq.*, it is not controlling. Petitioner never pleaded or attempted to prove a federal age claim in this case. Yet, Petitioner ignores the fact that no federal issue has ever been presented in this case and argues that the Sixth Circuit Court of Appeals' decision is in conflict with other decisions of other courts of appeal or that the Sixth Circuit's decision is "so far departed" from accepted and usual judicial proceedings as to call for the invocation of this Court's supervisory power. Both are preposterous positions.

Under well-established Michigan state law, in the context of an economic reduction in force case, it is insufficient as a matter of law for an age discrimination claimant to present evidence that a younger employee was retained and a competent older employee was job discontinued. *Matras v. Amoco Oil Co.*, 424 Mich. 675, 385 N.W. 2d 586 (1986); *Plieth v. St. Raymond Church*, 210 Mich. App. 568, 534 N.W. 2d 164 (1995). The Sixth Circuit's decision was a correct statement of Michigan law. In addition, if Petitioner were able to somehow transform his claim to a federal age claim after never pleading such a claim in the trial or appellate courts, the Sixth Circuit's decision does not conflict with cases in other circuits or the standards set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407(1993), and does not conflict with another Sixth Circuit panel's recent

holding in *Kline v. Tennessee Valley Authority*, 128 F.3d 337 (6th Cir. 1997). Most significantly, this case does not present immediate importance beyond the particular facts and parties involved.

As the court of appeals found, this is a work force reduction case. Economic circumstances forced Respondent Fiserv C.I.R. to reduce its work force, including the area in which Petitioner worked. Petitioner worked in an area with six (6) people, and the reduction in force required that the area retain only one (1) position. The company's managers selected the employee to be retained on the basis of performance evaluations. The strongest performer of the six (6) employees in the department had a performance rating of "outstanding" and was retained for the only remaining position. Petitioner himself had rated the retained employee as "outstanding" when he was a supervisor. Petitioner never challenged the qualifications of the individual selected to remain, or the decision that was made; nor did he ever challenge the validity of his performance evaluations. Unlike the other employees whose jobs were discontinued, Petitioner was offered two other positions at the same salary. Petitioner was also eligible for, and offered, a severance and retirement package. The undisputed facts established that Petitioner turned down offers of other employment with Respondent Fiserv C.I.R. and instead chose to retire.

The district court committed reversible error because it failed to follow established precedent applicable to work force reduction cases. Petitioner did not establish his burden of proof of age discrimination. In selecting the employee rated "outstanding" for retention during an economic reduction in force, Fiserv C.I.R. articulated a legitimate business reason which Petitioner failed to prove was pretextual. Therefore, the Sixth Circuit Court of Appeals properly reversed the district court.

## COUNTER-STATEMENT OF THE CASE

### A. Facts

Petitioner Kenneth Hutchinson, a fifty-six year old male, was employed from 1962 until his retirement in 1989 by Respondent Fiserv C.I.R. and its predecessors, who were in the business of providing data processing services to credit unions. [JA 109]. In 1986, Petitioner, one of three committee members managing Respondent's Troy, Michigan facility, suggested that the company change its management structure from a committee approach to a single branch manager. [JA 402-405, 407-408, 417-419, 652]. In June 1986, Respondent Brian Murphy-Molloy, a man in his mid-thirties, was selected as the data center manager of the Troy facility [JA 417-419], and Petitioner was given the title of "conversion and training manager." In March 1987, Petitioner was designated as a senior account executive with a reporting relationship to Molly Maginity, a woman in her twenties. He lost no salary as a result of any of these assignments and became eligible for commissions. Petitioner never expressed any dissatisfaction with his assignment to senior account executive. [JA 597-598]. Shortly thereafter, Maginity's supervisory authority was removed and given to Charles Smith and Wesley Vasey, who was Petitioner's supervisor at the time he chose to retire. At trial, Petitioner testified categorically that he did not believe that Vasey discriminated against him. [JA 559]. Similarly, he offered no reason to believe that his other direct supervisors discriminated against him; not Maginity [JA 546]; not Smith. [JA 548].

Concerns regarding Petitioner's performance arose shortly after Respondent Murphy-Molloy became branch manager and the ratings on Petitioner's performance evaluations fell. Petitioner demonstrated performance shortcomings in achieving identified performance goals and improperly handled the

purchasing of some equipment. [JA 513-518, 671, 723, 733; JA 437, 669].[1] Petitioner did not complain to anyone about any of his ratings and, in fact, testified that he agreed with the vast majority of his performance evaluation. [JA 479-481, 484, 676; JA 461, 463, 465, 467, 473].

From 1986 to 1989, the company experienced severe economic problems at several of its facilities, forcing it to close offices and to lay off more than 100 employees. [JA 589, 596, 599]. In 1989 alone, the company lost $6,000,000. [JA 589]. Although the Troy, Michigan facility was not closed, the company eliminated thirteen positions between 1988 and 1989, discharging all but one of its five senior account executives. The company chose to retain John Urban, citing Urban's superior performance ratings. [JA 584-585, 600-601, 615-618, 621, 750-775]. At trial, Petitioner admitted that he had also rated Urban as "outstanding" [JA 547] and that ranking and selecting employees on the basis of their performance evaluations would be a legitimate business decision. [JA 558-559]. While Petitioner attempted to argue at trial and in his Petition that the company violated its own policy by not using seniority as the deciding criteria for the individual to be retained, he admitted that the policy is intended to address reinstatement procedures applicable to people *after* their jobs have been discontinued. [JA 565, 777].

After eliminating his position, the company offered Petitioner his choice of accepting one of two alternative positions with the company, or taking early retirement with a severance package. [JA 394-395, 520, 524-525, 572]. Of the job discontinued senior account executives, Petitioner was the only

---

1. Petitioner claims he was falsely accused of taking kickbacks with regard to company purchases. However, the record actually reveals that there was never any accusation, but rather only a question regarding purchasing practices to which Petitioner conceded he was handling purchasing in the wrong manner. [JA 437, 669].

one offered alternative positions with the company. [JA 545, 550-551, 602]. While the alternative positions were two pay grades below that of a senior account executive, Petitioner's salary was guaranteed for a full year and he would have the opportunity to apply for other jobs that became available within the company. [JA 619]. Petitioner admitted that both jobs offered to him were comparable positions. [JA 550-551, 543-544]. Petitioner declined the alternative positions, accepted early retirement and ceased working sometime in August 1989. [JA 521, 527, 555, 561, 620]. Petitioner submitted his election for early retirement to be effective March 1, 1990. [JA 741, 743].

In October 1989, Robert Miotke replaced Respondent Murphy-Molloy as the branch manager of the Troy office. By late February 1990, the company's economic outlook had improved and Miotke was allowed to post a position for a second senior account executive. However, Petitioner testified that he never talked to anyone about the possibility of returning to work and that he never complained to any of his former co-workers about being discontent with his retirement. [JA 540-542]. Nor did Petitioner apply for the position. [JA 542, 591, 611, 776]. The company hired Dick Barage, a forty-six year old male.

**B. The District Court's Decision**

On April 18, 1991, Petitioner filed this lawsuit in the Circuit Court for the County of Oakland, State of Michigan, alleging that his termination violated the age discrimination provisions of the Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101, *et seq.* Thereafter, Respondents removed this action on the basis of diversity of citizenship to the United States District Court for the Eastern District, Southern Division of Michigan.

From April 11 to April 19, 1995, the parties tried the case

before a jury. Respondents moved the district court for a directed verdict at the close of Petitioner's case and again at the close of their own case. Before denying the motion for directed verdict and deciding to let the case proceed, the trial judge recognized the ultimate question in this dialogue with Petitioner's counsel:

> THE COURT: . . . To show pretext, there has to be some evidence that these people were thinking about age.
>
> MR. BUTLER: Correct.
>
> THE COURT: So where is it?

[JA 635].

The district court asked the right question, but Petitioner never answered. When the motion was renewed at the conclusion of all the evidence, the trial judge was still troubled by the record and asked Petitioner's counsel, "Where is the age discrimination?" [JA 637]. Again, Petitioner's counsel never answered the court's query. Nonetheless, the district court denied both motions.

The jury found in favor of Petitioner and awarded him $800,000. Respondents then filed post-trial motions to obtain a new trial, to amend the judgment and to obtain judgment as a matter of law. The district court denied these motions and entered judgment based on the jury award in favor of Petitioner. Respondents appealed to the United States Court of Appeals for the Sixth Circuit.

### C. The Court Of Appeals' Decision

On July 8, 1997, the Sixth Circuit reversed the district court's denial of Respondents' motion for judgment as a matter

of law and remanded the case to the district court to enter judgment in favor of Respondents. Relying on *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510 (6th Cir. 1991); *Matras v. Amoco Oil Co.*, 424 Mich. 675, 385 N.W. 2d 586 (1986); and *Barnell v. Taubman Co., Inc.*, 203 Mich. App. 110, 512 N.W. 2d 13 (1993), the court concluded, after reviewing all the evidence and inferences in the light most favorable to Petitioner, that Petitioner had failed to raise *any* inference of age discrimination and that a reasonable person could not have concluded that age was a determining factor in Respondent Fiserv C.I.R.'s decision to eliminate Petitioner's position. On July 21, 1997, Petitioner moved for rehearing in the Sixth Circuit. On August 12, 1997, the Sixth Circuit denied Petitioner's motion for rehearing.

## REASONS FOR DENYING THE WRIT

### I.

### CERTIORARI IS IMPROPER IN THIS CASE.

Rather that support a legitimate basis for the grant of certiorari, a review of the petition reveals that the primary basis for seeking certiorari is that the Sixth Circuit decided the instant case incorrectly. Petitioner does not even argue that the instant case poses any significance beyond the facts and named parties. Indeed, the alleged conflict upon which Petitioner bases his appeal is with another panel of the same court of appeals and Petitioner fails to specifically recite any conduct of the Sixth Circuit which departs "from the accepted and usual course of judicial proceedings."

**A. This Case Does Not Present Immediate Importance Beyond The Particular Facts And Parties Involved.**

This Court has long recognized that an incorrect decision of a lower court is not grounds for granting certiorari: "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions." *Boag v. MacDougall*, 454 U.S. 354, 368, 102 S. Ct. 695, 70 L. Ed. 2d 542 (1982) (Rehnquist, J., dissenting). As Justice Rehnquist commented in *Boag v. MacDougall*, if the Supreme Court

> took every case in which an interesting legal question is raised, or our prima facie impression is that the decision below is erroneous, [it] could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.

*Id.*

Petitioner argues that the Sixth Circuit improperly applied the burden shifting analysis established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and most recently addressed in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). Petitioner likewise argues that the Sixth Circuit's decision in this case conflicts with another Sixth Circuit panel's holding in *Kline v. Tennessee Valley Authority*, 128 F.3d 337 (6th Cir. 1997). Thus, Petitioner seeks to have this Court reaffirm its holding in *Hicks* and resolve an alleged intra-circuit conflict. Neither of these grounds warrant the grant of certiorari. To the contrary, the court of appeals' decision at issue

in this case is not published and does not purport to announce a new interpretation of *Hicks*. Similarly, by Petitioner's own argument, the Sixth Circuit's subsequent, published opinion in *Kline* properly sets forth evidentiary burden shifting under *Hicks*. Thus, the ramifications of the Sixth Circuit's opinion in this case are limited solely to the parties to this lawsuit. This case simply does not have "immediate importance far beyond the particular facts and parties involved."

**B. Conflicts Between Different Panels Of The Same Court Of Appeals Are Insufficient Grounds For Certiorari.**

Even if this case had importance beyond the instant facts and parties, reaffirming this Court's holding in *Hicks* is not a sufficient ground to grant certiorari. This Court has noted that it makes "poor use of judicial resources when, as here, [it takes] a case merely to reaffirm (without revisiting) settled law." *Powell v. Nevada*, 511 U.S. 79, 114 S. Ct. 1280, 128 L. Ed. 2d 1, 9 (1994) (Thomas, J., dissenting). Moreover, the alleged conflict with another panel of the same court of appeals is also insufficient to warrant the grant of certiorari. It is well established that:

> [C]ontrary decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself.

23 James W. Moore, *et al.*, Moore's Federal Practice, ¶ 510.21[2] n.4 (3d ed. 1997) (quoting Harlin, *Manning The Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 552 (1958)); *Wisniewski v. United States*, 353 U.S. 901, 902, 77 S. Ct. 633, 1 L.Ed. 658 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). To reconcile the alleged conflict, Petitioner should

have filed a motion for rehearing en banc, which he did not do. Petitioner simply fails to establish grounds for this Court to grant certiorari.

## II.

## THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH HICKS.

The essence of Petitioner's appeal lies in his claim that the Sixth Circuit erred when it proceeded "directly to the ultimate question whether plaintiff has established discrimination" because the case had been tried on the merits. *See, e.g., Brownlow v. Edgecomb Metals Co.*, 867 F.2d 960, 963 (6th Cir. 1989). However, Petitioner fails to show how the court's reliance on *Brownlow* in any way conflicts with this Court's holding in *Hicks* or the application of federal authority under the Michigan Elliott-Larsen Civil Rights Act.

Petitioner argues that reviewing the record for evidence of discrimination somehow runs afoul of *Hicks* by requiring *direct* evidence of discrimination. Taken to its logical conclusion, according to Petitioner's argument, he is entitled to judgment if he establishes a prima facie case and introduces some evidence that the employer's articulate reason was pretextual. Petitioner's argument is incorrect for at least three reasons.

### A. The Court Of Appeals Properly Reviewed The Record For Petitioner's Ultimate Burden Of Establishing Intentional Discrimination.

Petitioner first ignores the fact that once the plaintiff provides sufficient evidence of pretext, the "burden now merges with the ultimate burden of persuading the court that [he] has been the victim of intentional discrimination." *Hicks*, 113 S. Ct. at 2752 (quoting *Texas Department of Community Affairs v.*

*Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)). Indeed, this Court reaffirmed in *Hicks* that:

> [O]nce, the defendant has responded to the plaintiff's prima facie case, "the district court has before it all the evidence it needs to decide" *not* (as the dissent would have it) whether defendant's response is credible, but "whether defendant intentionally discriminated against the plaintiff." On the state of the record at the close of the evidence, the District Court in this case should have proceeded to this specific question directly, just as district courts decide disputed questions of fact in other civil litigation.

*Hicks*, 113 S. Ct. at 2753-54. Considering that Petitioner has the ultimate burden of persuading the trier of fact that he has been the victim of intentional discrimination and that Petitioner's burden of establishing pretext merges with his ultimate burden of establishing intentional discrimination, it is clear that the court of appeals did not err in reviewing the record to answer the "ultimate question whether plaintiff has established discrimination."

**B. Evidence To Establish A Prima Facie Case Is Insufficient To Overcome A Fed. R. Civ. P. 50(a) Or (b) Motion For A Judgment As A Matter Of Law.**

Second, Petitioner confuses the quantum of evidence necessary to state a prima facie case and that sufficient to overcome a motion for a judgment as a matter of law. As this Court held in *Hicks*, "what is required to establish the *McDonnell Douglas* prima facie case is infinitely less than what a directed verdict demands." *Hicks* 113 S. Ct. at 2751. Here, the court of appeals held that because another employee

> was judged the more competent of the two employees and Hutchinson does not challenge the impartiality of that judgment, Hutchinson has failed to demonstrate how Urban's retention constituted age discrimination.

[Pet. App. B, A-8]. "Hutchinson has failed to produce any evidence that age was a determining factor in the elimination of his job." [Pet. App. B, A-9]. Thus, the court of appeals, after considering all of the evidence adduced at trial in the light most favorable to the Petitioner, held that Petitioner's circumstantial evidence was insufficient to create an inference of discrimination.

**C. Petitioner Failed To Establish Intentional Discrimination By A Preponderance Of The Evidence.**

Third, Petitioner ignores the fact that the *McDonnell Douglas* burden shifting analysis merely allows Petitioner to prove discrimination through circumstantial evidence rather than direct evidence. Nothing in the Sixth Circuit's analysis or this Court's analysis in *Hicks* absolves Petitioner of his burden to prove intentional discrimination. In *Hicks*, this Court reaffirmed that once the employer provides evidence of a legitimate non-discriminatory reason for its action, the presumption raised by the plaintiff's prima facie case drops from the case. This Court held:

> If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and drops from the case. The plaintiff then has the full and fair opportunity to demonstrate, through presentation of his own case and through cross-examination of the defendant's witnesses, that the proffered reason was not the true reason for the employment decision and that [age] was. He retains

> that ultimate burden of persuading the trier of fact that he has been the ultimate victim of intentional discrimination.

*Hicks*, 113 S. Ct. at 2748 (citations omitted). Thus, as this Court's holding in *Hicks* makes clear, regardless of whether Petitioner proceeds with direct evidence or circumstantial evidence under *McDonnell Douglas*, he must still establish intentional discrimination by a preponderance of the evidence. As discussed above, the court of appeals found that Petitioner presented insufficient evidence to create any inference of discrimination. The court of appeals similarly found that Petitioner presented insufficient evidence of pretext. The court held: the company's "financial situation greatly improved between June 1989, when it discharged four of the five senior account executives, and February 1990, when it decided to hire Barage" and "Hutchinson neither expressed any interest in returning to work at Citicorp; he never sought the position that Barage was hired to fill." [Pet. App. B, A-9]. Accordingly, Petitioner failed to prove intentional discrimination by a preponderance of the evidence.

**D. The "Pretext Plus" Analysis Is The Law.**

Petitioner also argues that the court of appeals required him to establish "pretext plus," *i.e.*, that the employer's articulated reason was pretextual *and* that the real reason for its action was illegal discrimination. Petitioner relies on this Court's statement in *Hicks* that

> [R]ejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "no additional proof of discrimination is required."

*Hicks*, 113 S. Ct. at 2749. However, Petitioner fails to acknowledge the footnote in the middle of the quoted statement:

> [T]here is nothing whatever inconsistent between this statement and our later statements that (1) the plaintiff must show "*both* that the reason was false, and that discrimination was the real reason," . . . and (2) "it is not enough to disbelieve the employer . . . ." Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination, *there must be a finding of discrimination.*

*Id.* at 2549, n.4. Indeed, this Court held in *Hicks* that a "reason cannot be proved to be 'pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." *Id.* at 2751-52. Accordingly, *Hicks* adopts the "pretext plus" standard.

**E. The Court Of Appeals Did Not Require Petitioner To Present Direct Evidence Of Discrimination.**

Even if this Court rejected the "pretext plus" standard in *Hicks*, the Court did not do away with the requirement that a plaintiff establish that the employer's reason was pretextual in some way. Consistent with its ultimate burden of proving intentional discrimination, a plaintiff must produce evidence that the employer's proffered reason was not the true reason for its action. Once the plaintiff makes this showing, the circumstantial evidence supporting his prima facie case combined with the disbelief of the employer's proffered reason for its actions *may be*, but is not necessarily, sufficient evidence of intentional discrimination.

Here, the court of appeals held that Petitioner failed to produce any evidence that age was a determining factor in the elimination of his job. In so holding, the court did not require Petitioner to produce direct evidence of discrimination. To the

contrary, the court reviewed Petitioner's circumstantial evidence and determined that the circumstantial evidence was insufficient to create any inference of discrimination and insufficient to show that the employer's reason was pretextual. Nothing in this analysis required Petitioner to offer direct evidence of discrimination.

**F. The Court Of Appeals' Decision Does Not Conflict With Its Subsequent Decision In *Kline*.**

Petitioner's reliance on the Sixth Circuit's holding in *Kline v. Tennessee Valley Authority*, 128 F.3d 337, 1997 WL 631184 (6th Cir. 1997), does not change the appropriateness of the lower court's holding here. As set forth above, even if the court of appeals holding here conflicted with *Kline*, the Supreme Court is not the proper forum for intra-circuit conflicts. To reconcile conflicting decisions of two panels, Petitioner should have filed a motion for rehearing en banc.

Petitioner did not file a motion for rehearing en banc, no doubt because the court of appeals' decision here does not conflict with *Kline*. The panel in *Kline* held:

> [O]nce a plaintiff has disproved the reasons offered by the defendant, the fact finder is permitted to infer discrimination. A plaintiff does not need to introduce additional evidence of discrimination to prevail on the merits. Once a plaintiff establishes its prima facie case, this, along with disbelief of the defendant's proffered reasons for the negative employment actions, will permit a finding of discrimination by the fact finder.

*Kline*, 1997 WL 631184, at *11.

Here, nothing in the court of appeals' decision required

Petitioner to introduce additional evidence of discrimination. Indeed, the court of appeals held that Petitioner failed to create any inference of discrimination and failed to disprove the reasons offered by the defendant. The court held: because another employee

> was judged the more competent of the two employees and Hutchinson does not challenge the impartiality of that judgment, Hutchinson has failed to demonstrate how Urban's retention constituted age discrimination.

[Pet. App. B, A-8]. The company's

> financial situation greatly improved between June 1989, when it discharged four of the five senior account executives, and February 1990, when it decided to hire Barage. . . . Hutchinson neither expressed any interest in returning to work at Citicorp; he never sought the position that Barage was hired to fill. . . . Hutchinson has failed to produce any evidence that age was a determining factor in the elimination of his job.

[Pet. App. B, A-9]. Thus, there was insufficient evidence of intentional discrimination and the lower court's decision does not conflict with *Kline*.

## III.

## THERE WAS NO DISCRIMINATION AS A MATTER OF LAW.

### A. The Fact That Petitioner's Job Was Discontinued In A Reduction In Force Is Insufficient To Prove Age Discrimination.

This is a work force reduction case. The trial court erred in failing to follow the precedent applicable to reduction in force cases. Corporate reorganizations and reductions in force do not in-and-of-themselves create age discrimination causes of action for plaintiffs. The Sixth Circuit clarified what constitutes a work force reduction in *Barnes v. GenCorp Inc.*, 896 F.2d 1457 (6th Cir.), *cert. denied*, 498 U.S. 878 (1990), which describes the precise circumstances which led to Petitioner's job elimination:

> A work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company.

*Id.* at 1465. Indeed, "'[t]he most common legitimate reasons' for a discharge are the work force reductions." *Id.*

> By showing the other elements of a *McDonnell Douglas* case, a plaintiff has not presented any evidence indicating that the work force reductions are not the reasons for the discharge and therefore does not make out a *prima facie* case **absent additional direct, circumstantial, or statistical evidence tending to indicate that the employer *singled out* the plaintiff for discharge for impermissible reasons.**

*Id.* at 1465 (emphasis added).[2] The *Barnes* court further noted that "[o]ur conclusion would not change even if a plaintiff additionally demonstrated that younger persons were retained in other jobs which the plaintiff was qualified to perform." *Id.*

In *LaGrant v. Gulf & Western Mfg. Co., Inc.*, 748 F.2d 1087, 1091 (6th Cir. 1984), the Sixth Circuit held:

> [A]n age discrimination plaintiff who has been terminated amidst a corporate reorganization carries a greater burden of supporting charges of discrimination than an employee who was not terminated for similar reasons.[3]

Michigan courts have similarly applied the Elliott-Larsen Civil Rights Act. In a landmark age discrimination case, *Matras v. Amoco Oil Co.*, 424 Mich. 675, 385 N.W. 2d 586 (1986), the Michigan Supreme Court held that evidence that a competent older employee was terminated and a younger employee was retained, is insufficient standing alone to establish a case when the employer reduces his work force because of economic necessity. In *Plieth v. St. Raymond Church*, 210 Mich. App. 568, 534 N.W. 2d 164 (1995), the Michigan Court of Appeals adopted

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2. *See also Phelps v. Yale Security, Inc.*, 986 F.2d 1020, 1023 (6th Cir.), *cert. denied*, 114 S. Ct. 175 (1993); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 517 (6th Cir. 1991); *LaGrant v. Gulf & Western Mfg. Co., Inc.*, 748 F.2d 1087, 1090-91 (6th Cir. 1984) ("[T]ermination of a competent employee when an employer is making cutbacks due to economic necessity is insufficient to establish a *prima facie* case of age discrimination.").

3. *Ridenour v. Lawson Co.*, 791 F.2d 52, 57 (6th Cir. 1986); *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 941 (6th Cir. 1987) ("Particularly where economic necessity dictates reorganization, a conclusory statement alone is not probative of age discrimination.").

this Court's view in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993), and held that *where an employer's decision is wholly motivated by factors other than age, even if the motivating factor is correlated with age, there is no disparate treatment under the Civil Rights Act*. The plaintiffs were required to present evidence that age was a determining factor in the decision to discharge. Therefore, an employee bears a greater burden of proof in establishing discrimination based on age when an employer reduces his work force.

There can be no dispute that Petitioner's position as senior account executive was eliminated in the course of Respondents' nationwide restructuring and reduction in force in 1989. [JA 584-585, 589, 804]. Petitioner understood that there were company wide cutbacks because "they were in the red." [JA 551]. Between 1988 and 1989, thirteen positions in the Troy facility were eliminated, including four of the five senior account executive positions. [JA 584-585, 776]. Respondents selected for retention the only account executive with an "outstanding" performance evaluation who had demonstrated the ability to sell profitably with fewer customer problems after sale. [JA 616]. Petitioner alone was offered two other positions at the same salary as an alternative to severance. [JA 520]. Petitioner refused both of the jobs and instead chose a severance package which gave him fifty-four (54) weeks of pay as a lump sum payout and retirement benefits effective March 1, 1990. [JA 394-395, 521, 572]. Because of his decision to refuse the offered work, Petitioner was severed from employment on or about August 11, 1989. [JA 527, 739, 743].

Petitioner had no circumstantial or statistical evidence to support his age discrimination claim. *See, e.g., Barnes*, 896 F.2d at 1466. In fact, Petitioner admitted that he does not believe any of his direct supervisors, Mr. Vasey, Ms. Maginity or Mr. Smith,

discriminated against him. [JA 546, 548, 559]. There is no proof that in the process of evaluating Petitioner and the other candidates for the account executive positions, that age was ever a factor in retaining the employee who had outstanding performance evaluations. In short, all that Petitioner offered the district court as evidence for his claim was his personal conclusion that his age was a factor in his termination. Petitioner's subjective belief that he was selected because of his age is insufficient to carry his burden of proof. *See e.g., Manzer v. Diamond Shamrock Chemicals Corp.*, 29 F.3d 1078 (6th Cir. 1994).[4]

The district court recognized plaintiff's failure to present evidence of discrimination when, at the close of plaintiff's case, it asked "So, where is it?" [JA 636]. At the conclusion of evidence, still troubled by the record evidence, the trial court again asked, "Where is the *age* discrimination?" (Emphasis added) [JA 637]. Even when queried by the trial court, Petitioner offered no evidence of age discrimination to the district court. Petitioner could not identify anyone in Respondent's management who discriminated against *him*. At best, in challenging Respondents' motion for judgment as a matter of law, Petitioner attempted to raise only some "metaphysical doubt" as to the facts — and that is all he has to offer this Court now. Nowhere did he show that he was *singled out* for job discontinuation because of his age. In sum, Petitioner failed to show the district court and fails to show this Court any evidence whatsoever of age discrimination in the termination of his position. When no answer was given to the trial court's question, the court erred in giving this case to the jury and not acting as the gate keeper that it is supposed to be.

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4. *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 70 (6th Cir. 1982); *Locke v. Commercial Union Ins. Co.*, 676 F.2d 205, 206 (6th Cir. 1982). *See also Matras v. Amoco Oil Co.*, 424 Mich. 675 (1986); *Plieth v. St. Raymond Church*, 210 Mich. App. 568 (1995).

Petitioner's only purported evidence in support of his claim of constructive discharge is that he thought he would fail in the positions offered. However, the Sixth Circuit expressly rejected Petitioner's theory in *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510 (6th Cir. 1991). In *Wilson*, the Sixth Circuit affirmed the grant of a Rule 50 motion for judgment as a matter of law based upon the following facts. When Wilson's position was eliminated as a result of an economically motivated reorganization, he was presented with four options: (1) accepting a comparable position; (2) taking a lower-ranking position; (3) applying for a new job in the following two years; or (4) taking an early retirement/severance package. Wilson elected the last option — early retirement/severance package. The Sixth Circuit rejected Wilson's attempt to show that he was constructively discharged due to age discrimination. The presentation to him of other legitimate options for continued employment with the company precluded a finding that he was constructively discharged.

Petitioner was in a *better* position than Wilson since he was offered *two* comparable positions at the *same* salary. Despite Petitioner's self-serving testimony about his subjective fears, and his lawyer's unsubstantiated attempts to embellish that testimony, Petitioner offered no evidence showing that Respondents "intended to make his working conditions unpleasant had he stayed." *Wilson*, 932 F.2d at 515. Petitioner's subjective fear and/or apprehension regarding his own possible failure is *not* a sufficient basis to find discriminatory action on the part of Respondents. Speculation by Petitioner as to whether he could successfully perform in the offered work is *not* evidence upon which an age discrimination claim can be based.[5]

If the plaintiff in *Wilson* could not maintain a cause of action

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5. In fact, on cross-examination Petitioner admitted that he had "no doubt" that he was capable of doing both jobs offered. [JA 555].

for age discrimination, then certainly Petitioner cannot. Petitioner was not replaced. On July 31, 1989, Petitioner submitted his written election for retirement, to be effective on March 1, 1990. [JA 741]. Petitioner's last day of work was sometime prior to August 11, 1989. [JA 527, 739]. Petitioner received a lump sum of fifty-four (54) weeks pay as part of his severance package. On March 1, 1990, he began to collect his retirement income of $1,000 per month. [JA 394-395, 572].

In addition, the issue of the time interval between the decision to terminate and replace has been addressed by the Sixth Circuit in *Lilley v. BTM Corporation*, 958 F.2d 746, 752 (6th Cir. 1992). In *Lilley*, the plaintiff notified his employer in 1986 of an intent to retire, effective in October 1987. In July 1987, plaintiff was terminated from his position in sales. In April 1988, the employer hired a 29 year-old (Boehm) to work on its sales staff. The court held,

> The fact that nine months later business had picked up to the extent that another employee was needed in the sales department does not mean that Boehm replaced Lilley in any sense relevant to inferring age-based discrimination. *Cf. Simpson* [*v. Midland-Ross Corp.*], 823 F.2d [937,] 941 [(6th Cir. 1987)] *(three month interval "substantially weaken(s)" the inference).*

*Lilley*, 958 F.2d at 752 (emphasis added).

While Petitioner claims he was replaced by Barage, Barage was not hired until March 1990, after business conditions improved in February 1990. [JA 590-591, 776]. That was a full eight months after Petitioner's decision to retire. As the Sixth Circuit determined, the eight month interval between the time Petitioner quit working and someone else was hired cannot in

any sense be relevant to inferring age-based discrimination. Thus, Petitioner was not replaced.

**B. Petitioner Did Not Carry His Burden Of Proof Showing That The Articulated Business Reason For Job Elimination Was Pretextual.**

Equally glaring because of its absence is evidence of discriminatory animus. Respondents proved two separate legitimate business reasons for Petitioner's job discontinuance — (1) an economic reduction in force; and (2) Petitioner's lower performance ratings. Once these legitimate business reasons were presented, Petitioner had the burden to "produce evidence that age was a factor in the [constructive] discharge of the plaintiff and that but for this factor, plaintiff would not have been [constructively] discharged." *Phelps v. Yale Security, Inc.*, 986 F.2d 1020, 1023 (6th Cir. 1993); *see Wilson*, 932 F.2d at 514. No such evidence was presented in this case because none exists.

Petitioner's claim must fail because Respondents "articulated a legitimate business reason for the discharge in question." As the Sixth Circuit has stated:

> Unless the plaintiffs can show that the defendants' explanations are inherently suspect or can present other direct or circumstantial evidence suggesting that the proffered reasons are not true, then the defendants are entitled to summary judgment.

*Barnes*, 896 F.2d at 1469; *see also Hicks*, 113 S. Ct. at 2749; *Balwinski v. City of Bay City*, 168 Mich. App. 766, 425 N.W. 2d 218 (1988). Since Respondents have carried their burden of producing evidence of legitimate, nondiscriminatory reasons for Petitioner's termination — its restructuring and reduction in

force and Petitioner's lower performance ratings — Petitioner must produce additional evidence to rebut Respondents' explanation to show it was a pretext for age discrimination. *Hicks*, 113 S. Ct. at 2749; *Manzer*, 29 F.3d at 1083-1084. Petitioner must show either: (1) that Respondents' proffered reasons had no basis in fact; or (2) that the proffered reasons did not actually motivate his termination; or (3) that those reasons were insufficient to motivate his termination. *Manzer*, 29 F.3d at 1084. Petitioner did not and cannot produce such evidence.

In this case, jobs were eliminated in a legitimate economic cutback. [JA 584-585, 589, 599, 804]. Respondents articulated legitimate reasons for its selection of Urban over Petitioner to remain an account executive. That is, Urban had better performance evaluations. [JA 616, 750-775]. Petitioner himself had rated Urban as an outstanding account executive. [JA 547, 750-775]. Respondents selected the only employee with an "outstanding" performance evaluation who had demonstrated the ability to sell profitably with fewer customer problems after sale. [JA 616]. On cross-examination, Petitioner admitted that ranking and selecting employees on the basis of their performance appraisals would be a legitimate business decision. [JA 558-559]. Moreover, Vasey made the decision to discontinue Petitioner's account executive position, and Petitioner admitted that Vasey did not discriminate against him. [JA 558-559]. In fact, Petitioner was the only job discontinued individual who was offered comparable positions. [JA 520, 543-544, 676]. Petitioner admits that he refused the offered positions and instead chose to elect fifty four (54) weeks of severance and retire. [JA 561]. Respondents' legitimate business decisions to reduce force and select the highest rated employee for retention do not provide a basis for pretext.

Petitioner concedes that there was no direct proof of

discrimination. [Petitioner's Brief on Appeal at 18 and 24; JA 647]. Petitioner further concedes, by his silence, that he had no statistical proof of age discrimination. Rather, Petitioner's counsel posits three items as circumstantial proof of discrimination: (1) the alleged systematic removal of his authority by giving that authority to younger people; (2) the alleged violation of the Job Security policy found in Exhibit 71; and (3) the hiring of an account executive eight months after Petitioner left Respondents.

Even if Petitioner's counsel could somehow prove—which he cannot—that Murphy-Molloy engaged in a systematic removal of Petitioner's authority and gave that authority to younger people, he has not met his burden of proof to establish age discrimination. Absent the proof of an economic reduction in force, a systematic removal of authority may have been sufficient to prove one element of an age discrimination claim. However, in light of the undisputed economic reduction in force, that claim is wholly inadequate.[6] Petitioner's brief offers absolutely no proof that the economic reduction in force: (1) had no basis in fact; or (2) did not actually motivate the termination; or (3) was insufficient to motivate the termination. Simply no proof exists that Petitioner's age had anything to do with his selection for job discontinuance.

More importantly, absolutely no proof exists in the record that shows Murphy-Molloy forced the selection of Petitioner as one of the four account executives to be job discontinued. Quite the contrary, while Petitioner testified that Vasey did not discriminate against him [JA 559], the evidence in the record is

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6. Indeed, the retention of a person *not* within the protected class in a job similar to that of a discontinued worker within the protected class cannot be evidence sufficient to prove age discrimination in an economic reduction in force case or the results in *Wilson* and *Lilley* would have been different.

equally clear that Vasey decided which account executives would be job discontinued and which would be retained. [JA 615-616]. If the person who decided to eliminate Petitioner's job did not discriminate against him, we return to the original question: Where's the discrimination?

The second alleged circumstantial proof of discrimination is unsupported in the record. Petitioner's counsel argues that the failure of Respondents to retain him in the position of the sole remaining account executive was a violation of the company's seniority provisions in its personnel policy. [JA 777]. There is absolutely no proof in the record that Respondents violated any policy regarding the selection of persons to be job discontinued. To the contrary, the policy explicitly and unambiguously relates to actions to be taken by Respondents *after* a decision has been made to job discontinue an employee or group of employees. *Petitioner admitted this in his own testimony*. [JA 565]. Petitioner's counsel's creative editing aside, there is no proof that Respondents violated any seniority policy, and thus no inference that violation of such a policy is evidence of age discrimination can follow.[7]

Finally, Petitioner's claim that the hiring of another account executive (age 46) eight months after Petitioner left Respondents is insufficient to prove discriminatory animus as a matter of law. Likewise, the fact that business picks up and a company later hires cannot create an inference of age-based discrimination. *See Lilley*, *supra*; *Simpson*, *supra*. After Petitioner chose to retire, he expressed no interest in returning to work, nor did he express any dissatisfaction with his retirement. [JA 540-542]. The job Petitioner claims he should

7. With regard to Petitioner's purported "seniority factor" for determining job discontinuance, his use of testimony from prior litigation is taken out of context, deals with difference circumstances and is wholly irrelevant to the instant case.

have gotten was posted; however, he never applied for it. [JA 591, 611, 776]. The decision of Respondents to hire another individual eight months after Petitioner left the company with 54 weeks of pay as severance is not evidence to support a case of age discrimination, much less pretext. As previously noted, the Sixth Circuit has held,

> The fact that nine months later business had picked up to the extent that another employee was needed in the sales department does not mean that Boehm replaced Lilley in any sense relevant to inferring age-based discrimination.

*Lilley*, 958 F.2d at 752. Petitioner's counsel has offered no authority to the contrary.

In short, Petitioner has failed to demonstrate any legally sufficient proof of age discrimination in light of the economic reduction in force proven in the record. This Court should deny the petition for a writ of certiorari.

## CONCLUSION

Petitioner's counsel has argued that the Sixth Circuit applied the wrong standard in evaluating this age discrimination case and that the reduction in force that resulted in the elimination of his position was simply a pretext for an age discriminatory dismissal. In order to sustain the district court judgment upon that argument, this Court must ignore the facts in the record and the controlling precedent of Michigan law, this Court and the Sixth Circuit. Petitioner failed to prove age discrimination in the trial court. That is why the trial court asked "Where is the discrimination?" The trial court erred by failing to recognize that its own question went unanswered.

The Sixth Circuit answered the district court's question — "There is none." Thus, Petitioner's sole ground for certiorari is that the Sixth Circuit decided this case incorrectly. However, as the forgoing establishes, the court of appeals correctly decided this case, its decision does not conflict with other court of appeals decisions or another panel of the same court, and it has not "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power." Most significantly, Petitioner does not even argue that the questions presented by this case will have immediate importance beyond the particular facts and parties involved. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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